

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, - Docket No. 1:07-cr-647
-
Plaintiff, - Toledo, Ohio
- November 17, 2008
v. - Telephone Conference
-
ZUBAIR AHMED, and -
KHALEEL AHMED, -
-
Defendants. -

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE JAMES G. CARR
UNITED STATES DISTRICT CHIEF JUDGE.

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Proceedings recorded by mechanical stenography,
transcript produced by notereading.

09:31:20 1 (Commence at 9:31 a.m.)

09:31:20 2 THE COURT: Let me say this is the case of
09:31:30 3 United States of America versus Zubair and Khaleel
09:31:32 4 Ahmed, bears docket 1:07-CR-647. And who's on the
09:31:40 5 phone for the government?

09:31:42 6 MR. SOFER: Gregg Sofer for the government.

09:31:44 7 MR. GETZ: Tom Getz for the government.

09:31:46 8 THE COURT: Okay. And then for Zubair
09:31:52 9 Ahmed?

09:31:52 10 MR. GILBERT: Terry Gilbert.

09:31:54 11 THE COURT: Is Ms. Whitaker with you?

09:31:58 12 MR. GILBERT: Ms. Whitaker is not here
09:32:00 13 today.

09:32:00 14 THE COURT: For Khaleel?

09:32:00 15 MR. SLADE: Mike Slade and Alyssa Qualls are
09:32:04 16 here.

09:32:04 17 THE COURT: And Mr. Sieve is not with you?

09:32:06 18 MR. SLADE: That's correct; it will just be
09:32:08 19 us this morning.

09:32:10 20 THE COURT: Okay. I got an e-mail, or
09:32:16 21 actually Amy got an e-mail which she gave to me about
09:32:22 22 setting a hearing on the suppression motions. I
09:32:24 23 thought I had done that, didn't I?

09:32:26 24 MR. SOFER: You did, Judge. This is Greg
09:32:28 25 Sofer. I guess that's a good place for us to start

09:32:32 1 this morning. We have two requests with respect to the
09:32:34 2 hearings. You did set a date. You set a date of
09:32:38 3 December 1. The first request is to move that date
09:32:42 4 back about a week or so, if Your Honor would be willing
09:32:48 5 to. And there are two reasons for that. One is a
09:32:54 6 personal one for me; my wife is scheduled to have
09:32:56 7 surgery on that day.

09:32:58 8 THE COURT: Okay. Let me just interrupt.
09:33:00 9 It looks as though I could set them for the 9th and
09:33:04 10 10th, if that's okay with everybody else.

09:33:06 11 MR. GILBERT: Well, here's my problem,
09:33:10 12 Judge. If you could talk to Judge Gaughan, she is
09:33:14 13 adamant about me going to trial on the 8th on a civil
09:33:18 14 rights case.

09:33:18 15 THE COURT: Okay.

09:33:20 16 MR. GILBERT: And, in fact, I had asked her
09:33:22 17 about the possibility of continuing it for other
09:33:26 18 reasons, and she says no way. She cleared her calendar
09:33:34 19 for that. I have no problem with Mr. Sofer's request
09:33:40 20 if you can deal with my problem with Judge Gaughan.

09:33:56 21 I don't know how you feel about it, Mike and
09:33:58 22 Alyssa.

09:34:00 23 MR. SLADE: We're fine with it, Terry and
09:34:02 24 Greg.

09:34:08 25 MR. SOFER: What about, Mr. Sofer -- let me

09:34:10 1 ask you this: My problem is, and there is nothing I can
09:34:12 2 do about this, I'm sitting on the circuit on the 11th
09:34:16 3 and 12th. So --

09:34:20 4 Well, excuse me. Mr. Sofer, let me ask you
09:34:28 5 this: What about later that same week? In other words,
09:34:36 6 I'm available all day on the 3rd; the 4th I have to be
09:34:40 7 in Cleveland in the morning for a CLE, but actually --
09:34:52 8 and then the 5th I'm available all day as well -- well,
09:34:56 9 I've got a couple of things in the afternoon which
09:35:00 10 aren't -- so I could do it. Unfortunately, it would
09:35:06 11 have to be interrupted. I have to be in Cleveland at
09:35:10 12 9:00 to sort of welcome everybody, and then I'm in a
09:35:14 13 program from 12:00 to 2:00 on Thursday, the 4th.

09:35:20 14 MR. SOFER: I think, Judge, the problem with
09:35:20 15 that for me is --

09:35:26 16 THE COURT: You're in Texas.

09:35:28 17 MR. SOFER: That's not a problem, per se,
09:35:30 18 but the biggest problem, though, is my wife's surgery
09:35:32 19 means she basically will be off her feet, will have to
09:35:36 20 be off her feet for probably a couple days, and then
09:35:38 21 can't really do anything for at least the remainder of
09:35:42 22 that week, and basically I'm going to have to take the
09:35:46 23 week off of work and take care of our rowdy children.

09:35:52 24 MR. TERESINSKI: Jerry Teresinski just
09:35:58 25 joined.

09:35:58 1 MR. SOFER: Unless Jerry's offering to come
09:36:02 2 to my house and take care of my children.

09:36:04 3 MR. TERESINSKI: I'd be honored to take care
09:36:06 4 of your children.

09:36:08 5 MR. SOFER: That's my problem. Not knowing
09:36:10 6 what her physical state's going to be, I can't really
09:36:12 7 leave my house to her if she's not capable of picking
09:36:16 8 things up and moving around. So that -- my preference
09:36:20 9 would be to try to get that week at home. If Your
09:36:24 10 Honor just can't do it and/or counsel have a problem
09:36:30 11 with this, we could do it -- you could schedule it for
09:36:34 12 later in the week; I'd do my best to be there. But I
09:36:38 13 think as a result of my participation in some of the
09:36:40 14 motions and some of the issues, it causes problems for
09:36:44 15 the government if we can't move it back a little bit. I
09:36:48 16 don't know how counsel would feel about the next week.

09:36:50 17 One thing I would say, Judge, is our second
09:36:52 18 request may be linked to this first request, which is to
09:36:56 19 say we don't think hearings are necessary for a number
09:37:02 20 of issues that have been raised. We've argued this in
09:37:04 21 our motions. And given the fact that a number of our
09:37:08 22 witnesses are coming from out of town, rather than have
09:37:14 23 this amorphus situation --

09:37:16 24 THE COURT: That makes sense. Let's go
09:37:18 25 through the motions and see where we get.

09:37:22 1 MR. SOFER: Okay.

09:37:22 2 THE COURT: I was actually typing an e-mail
09:37:26 3 to Judge Gaughan, but --

09:37:30 4 MR. SLADE: Mr. Sofer, I thought we had
09:37:32 5 talked about this the last time, but I thought we
09:37:34 6 thought the only motion that we needed witnesses for was
09:37:36 7 Zubair's motion to suppress the items found in the
09:37:42 8 basement of Khaleel's house. Am I wrong about that?

09:37:48 9 THE COURT: No. No. I think we need a
09:37:50 10 hearing on --

09:37:56 11 MR. GILBERT: On the statements?

09:37:56 12 THE COURT: That's what I was going to say.
09:37:58 13 I think we need a hearing certainly on Zubair's motion
09:38:02 14 to suppress statements.

09:38:04 15 MR. SOFER: And, Your Honor, we don't think
09:38:06 16 there are issues of fact for -- at least from the papers
09:38:12 17 that have been submitted -- for portions of that motion.
09:38:16 18 So there were numerous statements made, and there are
09:38:22 19 arguments with respect to each of those statements.

09:38:24 20 These, by the way, include the proffer
09:38:26 21 sessions which counsel just filed a motion recently
09:38:32 22 withdrawing a particular argument with respect to the
09:38:34 23 motion -- with respect to his motion to suppress
09:38:36 24 statements made during the course of the proffer
09:38:40 25 sessions. But I guess I think that you're right, Your

09:38:44 1 Honor, that one's the one that we'd like to focus Your
09:38:46 2 Honor's attention on to at least read the both sets of
09:38:52 3 papers to tell us which of these statements the Court
09:38:56 4 believes there is a factual issue raised which requires
09:39:02 5 either us or the defense to call witnesses on. Now,
09:39:04 6 unless something changes, counsel may have witnesses
09:39:08 7 that they want to call or that they have not mentioned
09:39:12 8 in their papers or have arguments that they've not
09:39:14 9 mentioned in their papers. But barring that, we think
09:39:18 10 you could decide as to some of those statements that a
09:39:20 11 hearing is not necessary, or there may be a hearing
09:39:26 12 necessary.

09:39:26 13 The one that's most complicated, I think,
09:39:30 14 was the proffer sessions, which I think is a train wreck
09:39:36 15 waiting to happen, Your Honor, to use a colloquialism,
09:39:40 16 unless we deal with this pretrial. And from what I
09:39:44 17 understand -- and I must confess, I have not read
09:39:46 18 counsel's -- I've been unable to read counsel's motion
09:39:50 19 withdrawing the argument. But I've been told that the
09:39:54 20 papers say something to the effect that they're
09:39:56 21 withdrawing the ineffective assistance claim but relying
09:39:58 22 on the other arguments made in the motion. We don't see
09:40:02 23 any other arguments made in that motion. And we think
09:40:06 24 that once this issue's been raised now of ineffective
09:40:10 25 assistance, and the Court -- for the proffer, that it's

09:40:14 1 hard to put this genie back in the bottle.

09:40:18 2 So I guess again, Your Honor, our request is
09:40:20 3 that if we can set a hearing date today that I can
09:40:24 4 participate in, I would most appreciate it. At the
09:40:28 5 very least what we'd like to try to ask the Court to do
09:40:30 6 is to take a look at the motion to suppress statements
09:40:34 7 and give us at least a -- some preliminary guidance, if
09:40:40 8 not a decision, as to whether or not witnesses need to
09:40:46 9 be called in the hearing.

09:40:48 10 THE COURT: Hold on one minute, please.
09:40:48 11 Okay. Just a second, please.

09:40:56 12 MR. GILBERT: Maybe I can get a word in
09:40:58 13 edgewise.

09:40:58 14 THE COURT: Just a second, please. I'm
09:42:06 15 typing an e-mail to Judge Gaughan. I'd like to get her
09:42:12 16 to cooperate. Then we'll go through each of the
09:42:16 17 motions.

09:42:18 18 MR. GILBERT: Can I please respond to --

09:42:22 19 THE COURT: No. Let me type the memo,
09:42:26 20 Terry.

09:43:36 21 I'm sending her that e-mail right now.

09:43:44 22 Let's go through, in sort of no particular
09:43:48 23 order, just the order in which I reviewed them over the
09:43:52 24 weekend, or the order in which the stack was in front of
09:43:54 25 me. I just don't remember what I did on the

09:43:58 1 government's motion to take the deposition. That's
09:44:04 2 motion Number 72. Government's motion to take the
09:44:06 3 pretrial deposition. I know we talked about this last
09:44:10 4 week or shortly a while ago.

09:44:12 5 MR. SLADE: Your Honor, I think we're
09:44:14 6 waiting for Your Honor's ruling. That's been fully
09:44:16 7 briefed.

09:44:18 8 MR. SOFER: The government concurs.

09:44:20 9 THE COURT: Okay. Fine. Sorry. I would
09:44:24 10 have tried to do that this weekend. I'll try to do
09:44:26 11 that quite promptly.

09:44:28 12 MR. GILBERT: Thank you, Your Honor.

09:44:30 13 THE COURT: Okay. Now, with regard to
09:44:40 14 motion number 56, the FISA motion that's been filed
09:44:48 15 under seal. Has there been a government response to
09:44:50 16 that yet? I did not have it.

09:44:52 17 MR. SOFER: Our response is due -- you may
09:44:54 18 recall, Your Honor, we asked specifically for a little
09:44:56 19 more time for that one given the complexities. And I
09:45:00 20 think Your Honor said the 20th of this month for us to
09:45:06 21 file a response, and we anticipate we will file our
09:45:08 22 response in a timely fashion.

09:45:08 23 THE COURT: And then I assume I also have a
09:45:12 24 time for reply?

09:45:14 25 MR. SLADE: That's correct, Your Honor. Our

09:45:14 1 reply is due on December 15.

09:45:32 2 THE COURT: Now, in that motion on page 17
09:45:36 3 at Note 9 you request disclosure of any warrantless
09:45:44 4 electronic surveillance. I think that's on page 17.

09:45:52 5 Will the government be responding to that
09:45:54 6 request? And if so, do you know what the response is?

09:45:58 7 MR. SOFER: I think, Your Honor, we actually
09:46:00 8 did when this was last briefed. I believe that that --
09:46:08 9 that the government filed a response to that particular
09:46:12 10 issue. Certainly we will respond to it again if, in
09:46:18 11 fact -- we may reference our -- this whole motion, you
09:46:22 12 may recall, Your Honor, as with a number of these
09:46:24 13 motions, this is sort of the second time through. And
09:46:26 14 it is possible we would reference either documents filed
09:46:30 15 or motion responses from previous responses, although
09:46:36 16 we're responding anew to all of these motions.

09:46:40 17 THE COURT: Okay. I would ask that if you
09:46:44 18 could do so, rather than referring to other pleadings or
09:46:52 19 prior responses, if you could basically, even if it's
09:46:58 20 simply incorporating all the same text, which I assume
09:47:02 21 you have an electronic version, if you could do it in a
09:47:06 22 single document. It's just going to be easier for me
09:47:10 23 as I go through these if I've got a motion, a single
09:47:14 24 opposition, rather than one that incorporates by
09:47:18 25 reference one, two, three, or four other previously

09:47:22 1 filed pleadings.

09:47:24 2 MR. SOFER: We will do that, Judge. The
09:47:26 3 only thing I can think of where that may be a
09:47:28 4 complication is the Court has some attachments to this
09:47:32 5 previous motion that have -- that only the Court has.
09:47:38 6 At least that's my understanding.

09:47:42 7 THE COURT: That's fine. Then you can --
09:47:42 8 in that case, the main thing is if you give Amy a head's
09:47:46 9 up so she can retrieve that stuff, and when she
09:47:50 10 assembles the motions for me to start working on, she
09:47:54 11 can collect that and put them together. That's fine.

09:47:58 12 MR. SOFER: That's easy for us to do. As I
09:48:00 13 say, there will be a very small --

09:48:08 14 THE COURT: Okay. Now, I'm looking at
09:48:16 15 Khaleel's motion for severance.

09:48:20 16 MR. SLADE: Your Honor, our reply brief is
09:48:22 17 due today. It's going to be filed shortly, then it
09:48:24 18 will be fully briefed and ready for Your Honor's
09:48:28 19 decision.

09:48:28 20 THE COURT: Who's speaking, please?

09:48:30 21 MR. SLADE: I apologize. Mike Slade for
09:48:32 22 Khaleel. I believe, Your Honor, there was some thought
09:48:34 23 to doing oral argument on some of these motions the same
09:48:38 24 day that we were going to have the hearings. I'm not
09:48:42 25 sure what's going to happen to that given that we're

09:48:46 1 going to move the dates.

09:48:48 2 THE COURT: Well, let me see if she's gotten
09:48:58 3 back to me. I don't know if she has or not. I don't
09:49:02 4 expect that she will have. I have no problem, provided
09:49:18 5 we have time. Hold on one second. Now, this is the
09:49:32 6 motion I think, Mr. Sofer, that you were referring to at
09:49:36 7 least in part -- no, this is -- yeah.

09:49:40 8 MR. SOFER: The severance motion, Your
09:49:42 9 Honor.

09:49:42 10 THE COURT: The severance motion is
09:49:44 11 essentially a Bruton-type motion, right?

09:49:46 12 MR. SOFER: Well, there's multiple grounds,
09:49:50 13 Your Honor. One that the government would concede there
09:49:50 14 might be an issue on is the Bruton one. And we think
09:49:56 15 that can be resolved the same way -- under the same sort
09:50:00 16 of mechanism that we resolved it in the Amawi case.

09:50:04 17 THE COURT: You have not yet submitted a
09:50:16 18 proposed redacted version, I take it?

09:50:18 19 MR. SOFER: No. And that's for a number of
09:50:22 20 reasons. One is we don't -- the whole concept behind
09:50:30 21 the notion that there would be a Bruton problem begs --
09:50:34 22 goes back to begging the question as to whether the
09:50:36 23 proffer itself would be admissible. And since at least
09:50:42 24 at the time of this motion there was a motion to
09:50:44 25 suppress the proffer statements. And I take it even

09:50:48 1 though Mr. Gilbert hasn't yet had an opportunity to get
09:50:50 2 a word in edgewise, that even though he's withdrawn a
09:50:56 3 portion of that motion, he still is seeking suppression
09:50:58 4 of the proffered statement. We thought it was putting
09:51:00 5 the cart somewhat before the horse.

09:51:02 6 THE COURT: Let me ask you this: Do you
09:51:06 7 think that you could provide -- prepare and provide the
09:51:10 8 proposed redacted version before whatever date it is we
09:51:14 9 have the motions heard on?

09:51:18 10 MR. SOFER: Absolutely we could, Judge.

09:51:20 11 THE COURT: Why don't we do that.

09:52:00 12 Okay. Government to provide proposed
09:52:06 13 redacted version of Defendant Zubair Ahmed's proffer
09:52:16 14 statement one week prior to date for hearing on pending
09:52:28 15 motions. Okay.

09:52:28 16 MR. SOFER: Not a problem, Judge.

09:52:30 17 THE COURT: And then we can -- Terry
09:52:36 18 Gilbert, then we can take up -- I would expect to
09:52:40 19 address in one way or another whatever needs to be
09:52:42 20 talked about on the hearing date. Okay?

09:52:46 21 MR. GILBERT: Right. Let me just throw
09:52:50 22 this out to clarify the status of those motions, if you
09:52:54 23 are interested in hearing about it now, Judge.

09:52:56 24 THE COURT: I am. Go ahead.

09:52:58 25 MR. GILBERT: It is true that we withdrew

09:53:00 1 the argument on the ineffective assistance claim, which
09:53:06 2 basically means that the conversations that Zubair had
09:53:08 3 with counsel that he had at the time when the proffers
09:53:16 4 were made as to state of mind and volunteerism and that
09:53:24 5 kind of thing, we will not pursue. This does not
09:53:28 6 eliminate the suppression issue on the proffers because
09:53:32 7 there were interviews that occurred prior to that time
09:53:36 8 without counsel with Zubair. And as you look through
09:53:40 9 our motion, we claim that there were misrepresentations
09:53:44 10 made by the government agents.

09:53:48 11 THE COURT: And as to that motion -- is that
09:53:52 12 part of the same motion? I just can't recall.

09:53:56 13 MR. SOFER: No, that motion is the motion to
09:53:58 14 suppress statements.

09:54:00 15 MR. GILBERT: It's all part of one motion.

09:54:02 16 THE COURT: It's all included in one motion.

09:54:06 17 MR. GILBERT: And obviously I think we need
09:54:08 18 those agents there.

09:54:08 19 THE COURT: Excuse me. I agree with you.
09:54:10 20 I think that any agent who participated in those
09:54:14 21 sessions should be available to testify.

09:54:16 22 MR. SOFER: Before the Court makes that
09:54:18 23 determination, I would just ask that you read our legal
09:54:22 24 response, which basically argues even if those
09:54:28 25 representations were made, that there is no -- I think

09:54:34 1 our argument is, again, even assuming that those
09:54:38 2 misrepresentations were made, that there is no basis for
09:54:42 3 suppression.

09:54:42 4 THE COURT: Well, I have read them. And
09:54:46 5 quite candidly -- I have read them; I've read all the
09:54:50 6 motions and the oppositions. I've read everything that
09:54:58 7 was in the stack, okay, thus far. And quite candidly,
09:55:04 8 I prefer to err on the side of caution and go ahead and
09:55:08 9 have a record made. I realize that I'm fully familiar
09:55:12 10 with the general rule that deceit or trickery on the
09:55:16 11 part of the government in advance of procuring evidence,
09:55:22 12 whether it's physical evidence or statements, generally
09:55:26 13 is not a basis for suppression. But I do think that
09:55:32 14 given the nature of the case and its importance and the
09:55:34 15 potential consequences of a conviction that it's
09:55:38 16 appropriate to exercise some caution and to conduct a
09:55:44 17 hearing.

09:55:48 18 MR. SOFER: But, Your Honor, again, I don't
09:55:50 19 mean to be argumentative about this and I know from our
09:55:54 20 prior experience you'll tell me to be quiet when I need
09:55:56 21 to be, but if we call the agents and the agents get up
09:56:00 22 there and just say, Yes, the things that were said in
09:56:06 23 the defense papers are accurate. And I'm not saying
09:56:10 24 that this necessarily is what they would say, but if
09:56:12 25 that's their testimony, and that issue's already been

09:56:16 1 briefed, it just seems -- you'll pardon me for saying
09:56:22 2 this; it seems like a bit of a waste of everybody's time
09:56:26 3 if this ultimately is a legal question, not a fact one.

09:56:32 4 THE COURT: No, I have made my mind up on
09:56:34 5 that. I want to develop a factual record.

09:56:36 6 MR. SOFER: Very well.

09:56:38 7 THE COURT: Also, for example, I don't --
09:56:40 8 and that is something that easily can be addressed in
09:56:42 9 terms of the, quote, notice that was provided by the
09:56:48 10 forms that were received. I don't think the record
09:56:50 11 indicates when those -- when Zubair actually got the
09:56:56 12 various forms about -- that are included as exhibits
09:57:06 13 from ICE or INS, whoever it was.

09:57:20 14 (Discussion had off the record.)

09:57:34 15 THE COURT: I just got an e-mail from Judge
09:57:38 16 Gaughan. Hold on one minute.

09:57:50 17 (Discussion had off the record.)

09:57:54 18 THE COURT: She asked whether I can do it
09:57:56 19 the week of the 14th. But the problem is with that,
09:58:00 20 I've got hearings in -- how many people in Ruiz? I've
09:58:06 21 got pretrial hearings in a 15-defendant drug case set
09:58:10 22 that week. And then I'm gone the next two weeks. So
09:58:14 23 I'm just going to tell her. So she's not going to be
09:58:16 24 happy, but that's too bad.

09:58:28 25 So on motion 62, okay, I assume that you can

09:58:50 1 give me that information about when Zubair would have
09:58:52 2 gotten those or whether he did, in fact, get those
09:58:54 3 notices and all that.

09:58:56 4 MR. SOFER: Yes, Judge. We're still stuck
09:59:02 5 with, for instance, the question then on the proffers;
09:59:06 6 if counsel is looking to attach this argument
09:59:10 7 essentially and bootstrap it to the argument that the
09:59:14 8 proffers then are somehow tainted by pre-proffer
09:59:20 9 interviews by government agents --

09:59:22 10 THE COURT: Mr. Sofer, can I interrupt for a
09:59:24 11 moment? Judge Gaughan is on the other phone. Half a
09:59:28 12 minute, please.

10:01:54 13 (Discussion had off the record.)

10:01:56 14 THE COURT: Let's go back to where we
10:01:58 15 started. I will postpone the hearing until the 9th and
10:02:00 16 10th. Okay. Terry, Judge Gaughan's office will be in
10:02:08 17 touch with you about it.

10:02:10 18 MR. GILBERT: Thank you, Judge.

10:02:10 19 THE COURT: No problem.

10:02:10 20 MR. GILBERT: I just hope she doesn't think
10:02:12 21 that I did something.

10:02:14 22 THE COURT: No, I made very clear.

10:02:16 23 MR. GILBERT: Because I actually had talked
10:02:18 24 about getting it continued for other reasons.

10:02:20 25 THE COURT: No, that fine.

10:02:22 1 MR. GILBERT: And I was then prepared to go
10:02:24 2 forward.

10:02:24 3 THE COURT: I made it very clear. In my
10:02:26 4 e-mail I said that lead government counsel had these
10:02:32 5 hearings set, and lead government counsel advised me his
10:02:34 6 wife is having surgery, and he has to be home that week
10:02:38 7 to tend to her and her children.

10:02:40 8 MR. SOFER: Your Honor, to you and to
10:02:42 9 counsel, I appreciate your flexibility.

10:02:46 10 MR. GILBERT: Well, you did me a favor.

10:02:48 11 THE COURT: No, Terry, we don't want to put
10:02:50 12 that on the record. Off the record.

10:02:52 13 (Discussion had off the record.)

10:02:58 14 MR. SLADE: Your Honor, what time are we
10:03:44 15 going start on the 9th?

10:03:46 16 THE COURT: I'd like to start at 8:30 if we
10:03:50 17 can. That's normally when I start hearings and stuff.

10:03:56 18 MR. SOFER: We will keep the 10th open too.

10:03:58 19 THE COURT: Yeah. I have to leave, though.
10:04:02 20 I must leave about 2:00 in the afternoon on the 10th, if
10:04:06 21 not sooner. So we're going to have to be done. That
10:04:10 22 means, depending -- if we have to go late into the
10:04:14 23 evening on the 1st day, the 9th, we will. Okay.
10:04:40 24 Because I'm planning to meet with a Judge Wednesday
10:04:44 25 evening with whom I'm hearing arguments on that Thursday

10:04:52 1 and Friday.

10:04:56 2 And I'll have -- government to propose
10:04:58 3 redacted version of Zubair's proffered statement on or
10:05:04 4 before December 2. Okay?

10:05:06 5 MR. SOFER: Very well, Judge.

10:05:08 6 This proffer, though, as I was saying, Your
10:05:12 7 Honor, is, I think, probably one of the more complicated
10:05:18 8 issues here. And we believe that if counsel continues
10:05:24 9 to argue that the proffer should be suppressed, that
10:05:26 10 that makes Mr. Collins, Zubair Ahmed's former attorney,
10:05:32 11 a witness in this case. Even if he's going to say that
10:05:38 12 the only -- his only basis for arguing the suppression
10:05:42 13 of the proffer is previous misrepresentations made by
10:05:48 14 government agents, it still then begs the question
10:05:52 15 whether or not Mr. Ahmed, that is, Zubair Ahmed, when he
10:05:58 16 sat in a room with his lawyer, whether those statements
10:06:00 17 should be suppressed, it still opens that door, it seems
10:06:04 18 to us, in terms of understanding then the appearance of
10:06:12 19 attorney/client privilege, to understand was his will
10:06:16 20 overborne at that point, or was there any other legal
10:06:18 21 basis for suppression? There's just no way to excise
10:06:26 22 that piece of the equation, it seems to the government.
10:06:30 23 And we need to know whether or not we are going to be
10:06:34 24 given, A, the ability to speak with his previous lawyer
10:06:38 25 on this issue, or call him as a witness. We would

10:06:44 1 probably call him as a witness for the government to
10:06:46 2 say, like --

10:06:48 3 THE COURT: Let me -- I would tend to agree
10:06:50 4 that to the extent that Zubair is contending that there
10:07:00 5 was some defect in the proffer process, particularly to
10:07:08 6 the extent that he would contend that his participation
10:07:10 7 was not voluntary or he was somehow misinformed or
10:07:14 8 misled by the government, that because he had counsel,
10:07:22 9 even though he no longer may directly be challenging
10:07:26 10 counsel's adequacy, he at least is doing so indirectly.

10:07:34 11 And there's some noise in the background.
10:07:36 12 It sounds like the wind or somebody's breathing. It's
10:07:38 13 hard for Tracy to pick up.

10:07:40 14 So anyway, I certainly am inclined to agree
10:07:44 15 that if we're going to proceed on the challenge to the
10:07:50 16 proffer in terms of its actual taking, I think it's
10:07:56 17 necessary for the government to be in a position to
10:08:00 18 speak with and call former counsel, particularly in
10:08:08 19 light of its representation that in its opposition, Hey,
10:08:12 20 Judge, this is not a rookie. This is a guy who's tried
10:08:16 21 and defended criminal cases pretty extensively. So I
10:08:24 22 don't think that, Terry Gilbert, you can wiggle off the
10:08:26 23 hook of that problem by saying, Well, Judge, we won't
10:08:30 24 challenge his effectiveness, so long as you continue to
10:08:36 25 challenge the lawfulness of the taking of the proffer

10:08:42 1 itself.

10:08:46 2 MR. GILBERT: Well, I think, you know, the
10:08:50 3 ultimate question is, to what extent is the waiver
10:08:58 4 diminished? It can't be an open door policy, it seems
10:09:02 5 to me, in terms of every communication made between
10:09:06 6 Zubair and his prior lawyer.

10:09:08 7 THE COURT: I think that is entirely fair
10:09:12 8 because the, quote, subject matter encompassed by the
10:09:16 9 waiver would be conversation relating to the proffer
10:09:28 10 itself and the process of the proffer, perhaps not even
10:09:30 11 the content of the proffer, but rather conversations as
10:09:38 12 to: The government has offered to permit you to come in
10:09:44 13 to take a proffer. This is what is involved. This is
10:09:48 14 what a proffer is. Whether he was told he didn't have
10:09:52 15 to do the proffer. That sort of thing. I mean, really
10:09:56 16 bearing on, quote, the ineffectiveness of
10:10:04 17 representation, going into the proffer itself, even
10:10:08 18 though the challenge may not be defined as such, I'm
10:10:12 19 just trying to define how I would view the, quote,
10:10:18 20 subject matter of any waiver.

10:10:22 21 MR. SOFER: All I'll say about that, Judge,
10:10:24 22 is I don't necessarily disagree with the concept that
10:10:26 23 there would be some sort of potential limitation, but
10:10:32 24 this is going -- that, in and of itself, is going to be
10:10:34 25 sticky. Just -- I am positing just one scenario.

10:10:40 1 But, I mean, if counsel had conversations with his
10:10:44 2 client, and his client chose to come in and tell the
10:10:50 3 government what he had done, and those conversations
10:10:56 4 relate to the substance of what was said, some of that's
10:11:00 5 going to be hard to excise, again, just because the
10:11:06 6 conversation would likely go something like: Well, you
10:11:08 7 know, I did, this, this, this, and this, and what if I
10:11:12 8 tell them that? Then counsel says, Well, this is done
10:11:14 9 under the following agreement, and I've done this many
10:11:18 10 times, and they can't use this against you in their
10:11:22 11 direct case against you at trial, but it's probably in
10:11:24 12 your interest to do that. And he says, Okay, well, I
10:11:28 13 don't want to go to jail for such and such period of
10:11:30 14 time, but I also don't want to tell them I did this if
10:11:36 15 they'll think that's so terrible. It's very likely
10:11:40 16 that these two concepts that -- and keep in mind the
10:11:42 17 government has the substance of what Zubair Ahmed said,
10:11:48 18 his inculpatory statements. It's not as if we would
10:11:52 19 discover something new. Nor do I think we obviously --
10:11:54 20 we could not use -- certainly could not use some new
10:11:58 21 statement, substantive statement made by the defendant
10:12:02 22 to his lawyer in the confines of the attorney/client
10:12:04 23 privilege. We couldn't then call his lawyer, I don't
10:12:08 24 think, at trial and say: Hey, by the way, did he also
10:12:10 25 say this? That's not what the government's seeking to

10:12:14 1 do here. We just want to be able to fully defend the
10:12:16 2 argument that somehow, as you say, there was a defect in
10:12:20 3 this process that causes suppression to be a potential
10:12:24 4 remedy.

10:12:24 5 THE COURT: Let me ask you this. This is
10:12:28 6 all in anticipation of Zubair's taking the stand,
10:12:34 7 testifying, and testifying in a way that differs from
10:12:40 8 what he said during the proffer, and thereby giving --
10:12:46 9 putting the proffer then in your hands for the first
10:12:48 10 time to use on cross-examination; is that correct?

10:12:50 11 MR. SOFER: Well, Your Honor, that is an
10:12:52 12 excellent question. And that ultimately is where I
10:12:56 13 think this is headed. And when I described the train
10:13:00 14 wreck previously, that's the train wreck I'm most
10:13:04 15 worried about. Actually, the proffer agreement is
10:13:06 16 drafted in way that is much more wide open in terms of
10:13:12 17 the government's ability to use particular statements.
10:13:16 18 Now, we are presently -- we believe counsel has already
10:13:18 19 stepped over that line a number of times, including in
10:13:22 20 the detention hearing where arguments are being
10:13:26 21 forwarded to the Court by counsel to or via his motions,
10:13:32 22 and they are in direct contravention of the statements
10:13:36 23 made by the client in the proffer, and that the
10:13:40 24 government should be able to now use the proffer
10:13:42 25 agreement.

10:13:44 1 Now, there is not -- I have to tell the
10:13:46 2 Court that the government is in the process internally
10:13:50 3 of working this out. There are all kinds of policy
10:13:54 4 questions here for us internally before we would
10:13:56 5 formally -- I'm expressing my personal opinion about
10:14:00 6 this, not necessarily the opinion of -- formal opinion
10:14:02 7 of the government. And so we need to work that out.
10:14:06 8 But there is a significant possibility at least that the
10:14:10 9 government could take the position that that line's
10:14:14 10 already been passed. For instance, if counsel again --
10:14:16 11 I'll try to use this in a hypothetical --

10:14:20 12 THE COURT: Can I interrupt because we --
10:14:22 13 I'm jamming up against at lot of other things I've got
10:14:26 14 to attend to this morning. I understand all of that.
10:14:32 15 But I would also hope -- I mean, I trust that whoever's
10:14:34 16 making this decision understands, it seems to me, that
10:14:42 17 if the decision is made the wrong way, or one way, and I
10:14:48 18 say that's okay, in other words, you can introduce the
10:14:52 19 proffer and/or you can call the lawyer, the witness, or
10:14:56 20 whatever, all the different ways that this could unfold,
10:15:00 21 you know, aside from handing clearly a very substantial
10:15:04 22 issue on appeal, it does seem to me that that's the kind
10:15:10 23 of, depending how far I let you go with it, the kind of
10:15:16 24 thing that could undo the whole conviction and bring us
10:15:18 25 back unnecessarily.

10:15:22 1 MR. SOFER: We absolutely --

10:15:24 2 THE COURT: Excuse me. I'm not quite done.

10:15:26 3 So you can point to this in the transcript if you want.

10:15:28 4 I do hope that the government -- I mean, I can't imagine

10:15:32 5 that all of this is that crucial to the government's

10:15:36 6 case in chief. All right. It's either got its case

10:15:42 7 without the lawyer and without the proffer, or it

10:15:44 8 doesn't. And if it does, fine. If it doesn't, well,

10:15:50 9 that's its choice, and it will have to go from there.

10:15:54 10 But I hope whoever's making this decision at whatever

10:15:56 11 level of the government isn't going to sort of test the

10:16:00 12 limits and the waters and see how far it can push it and

10:16:04 13 all of that. Okay. That's all.

10:16:06 14 What I would suggest is for now that we

10:16:10 15 anticipate -- well, let's put it this way. I would like

10:16:18 16 the government to -- well, hold on a minute. What I'd

10:16:24 17 like to do is forego having to address this issue by way

10:16:28 18 of hearing or otherwise on December 9 or 10, and if

10:16:34 19 necessary, I mean, it's a half day hearing; I can't

10:16:36 20 imagine it's going to take more than that. And what I

10:16:40 21 would like to do is to leave this to anticipate that

10:16:46 22 this will not come up until such time as Zubair has

10:16:52 23 testified, and if necessary, I'll take the half day or

10:16:56 24 day or whatever it takes to tell you whether you can --

10:17:00 25 whether and what you can do on cross-examination or in

10:17:04 1 rebuttal when and if the time comes. And unless the
10:17:12 2 government says, Judge, no, want this issue -- here's
10:17:16 3 what we want to do on direct in our case in chief,
10:17:20 4 regardless of whether he testifies, at which time I'll
10:17:24 5 find the time to hear the issue.

10:17:26 6 MR. SOFER: That's fine, Judge. Just to
10:17:28 7 respond to what you said earlier, we absolutely are
10:17:30 8 aware of the consequence of all of this and do not take
10:17:34 9 this lightly. But we also believe that we should try,
10:17:40 10 to the extent possible, to resolve it pretrial because
10:17:42 11 you have a severance motion which relates to some extent
10:17:48 12 on the litigation of this issue, and there are other
10:17:50 13 implication of this issue as well. And so we do think
10:17:52 14 it would be important to do a pretrial -- may I propose
10:17:56 15 the following alternative: That the government inform
10:18:02 16 the Court within the next week or ten days as to whether
10:18:08 17 we believe something other than the actual testimony of
10:18:16 18 Zubair Ahmed in contravention of statements he made at
10:18:20 19 the proffer is something that we would attempt to use in
10:18:24 20 our direct case. That will tell you at least the
10:18:26 21 likelihood of this happening. But I have to tell you,
10:18:30 22 Your Honor, I think even if we all come to an agreement,
10:18:32 23 which we may, that the only way that this could come up
10:18:36 24 is if Zubair Ahmed testifies, I still think the issue,
10:18:40 25 for instance, as to whether or not there's a Bruton

10:18:44 1 question should be litigated now because we can't sever
10:18:48 2 the case in the middle of the case.

10:18:50 3 THE COURT: I understand that. But that is
10:18:54 4 a different issue, and that's why I have you by December
10:18:56 5 2 submitting a redacted version, so we can address the
10:19:02 6 Bruton question, which is a separate question, if we
10:19:08 7 need to do so when we're together on the 9th and 10th.

10:19:16 8 MR. SLADE: This is Mike Slade for Khaleel.
10:19:18 9 I actually think Mr. Sofer's proposal would be very
10:19:22 10 useful. I agree with him 100 percent that we ought to
10:19:26 11 be resolving this pretrial. And I do think it could
10:19:30 12 cut through a lot of the shaft if the government were to
10:19:32 13 make that decision whether anything other than Zubair
10:19:36 14 actually testifying contrary to the proffer would, in
10:19:40 15 the government's view, lead to its admission. So I --
10:19:44 16 at least from our perspective, we'd like to take the
10:19:46 17 government up on that offer, if the Court thinks its
10:19:50 18 would be helpful.

10:19:50 19 MR. GILBERT: Judge, from my standpoint, in
10:19:52 20 defending Zubair, obviously I don't want Mr. Sofer
10:19:58 21 jumping up in my opening statement and saying I've gone
10:20:00 22 over the line.

10:20:04 23 MR. SOFER: That's right, Judge. And
10:20:06 24 again, I think the frustration of the government
10:20:08 25 obviously is if Mr. Gilbert gets up in his opening

10:20:14 1 statement and makes a series of arguments to the jury
10:20:18 2 which fly directly in the face of the admissions of his
10:20:22 3 client during the proffer statement, absent somebody
10:20:26 4 from the government as a whole deciding that we can't do
10:20:30 5 it, it seems to me that it puts us in a very difficult
10:20:36 6 position without knowing the answer to that.

10:20:38 7 THE COURT: Also -- excuse me, but let me
10:20:40 8 say this: If that happens, number one, that depends --
10:20:50 9 back up. First, I will be giving Mr. Gilbert the
10:20:56 10 choice whether to present an opening before the
10:21:00 11 government presents its case or at the conclusion of the
10:21:04 12 government's case.

10:21:04 13 Second, if he elects to present an opening
10:21:10 14 at the outset of trial, and if you believe he crosses
10:21:12 15 that line so that now you will be seeking to offer the
10:21:18 16 statement and other testimony perhaps in your case in
10:21:26 17 chief, again, it seems to me that we can address the
10:21:30 18 issue then. I'll take the time necessary. If it
10:21:32 19 means telling the jury to come back a day later than we
10:21:36 20 thought, I will do so. But certainly you wouldn't be
10:21:42 21 getting any rebuttal opening opportunity at the
10:21:44 22 conclusion of his opening statement; you could approach
10:21:48 23 and say, Judge, he's triggered it. Now we've got to
10:21:50 24 deal with it. He may not.

10:21:50 25 (Several people speak at the same time.)

10:21:58 1 THE COURT: One person at a time. Terry
10:21:58 2 Gilbert, is that you talking?

10:22:00 3 MR. GILBERT: Yes.

10:22:02 4 We have been thinking about this, obviously,
10:22:02 5 for a long time. And as you know, in our district the
10:22:12 6 language that was -- that kind of language is not in the
10:22:16 7 proffers. So I think we're treading on some territory
10:22:20 8 that is unfamiliar. But obviously I want to present an
10:22:26 9 ethical defense, and I don't want to do anything that's
10:22:30 10 going to harm my client. So I think we need to know
10:22:32 11 before we start, not after the opening statement, what
10:22:38 12 the parameters of this is.

10:22:38 13 THE COURT: Well, let me --

10:22:42 14 MR. SOFER: I hate to find myself in
10:22:44 15 agreement with Mr. Gilbert, Your Honor, but we concur.
10:22:48 16 I think there is also a role for the Court potentially
10:22:50 17 in interpreting the proffer statement. Let's say the
10:22:56 18 government took a more aggressive position and said we
10:23:00 19 think he's already -- or during an opening statement
10:23:02 20 that he's gone over the line. The Court may take a
10:23:06 21 look at this document -- which is a contract,
10:23:08 22 essentially -- and interpret it differently. But I
10:23:14 23 think the first step is the government getting its
10:23:18 24 decision to all parties. And I would agree that's on
10:23:22 25 us to do.

10:23:24 1 THE COURT: Let me interrupt. Excuse me.
10:23:26 2 I've just typed the following: Government to notify the
10:23:30 3 Court and counsel by December 2 what use, if any, it
10:23:32 4 anticipates making of defendant Zubair Ahmed's proffer
10:23:36 5 prior to his testimony.

10:23:36 6 MR. SOFER: That's fine, Judge. We can do
10:23:40 7 that. And we'll --

10:23:40 8 THE COURT: Wait a minute, please. And
10:23:42 9 what I will do then is -- what I would anticipate would
10:23:48 10 be making a decision when we're together on the 9th and
10:23:54 11 perhaps the 10th as to whether I need to or anybody
10:24:00 12 wants me to hold a further hearing only on this issue
10:24:08 13 during the second week of January. I will simply find
10:24:12 14 the time then to do that. I mean, until we know what
10:24:16 15 the government anticipates doing, Mr. Gilbert doesn't
10:24:20 16 know what he likely to do in terms of formulating his
10:24:22 17 own opening statement, much less when he's likely to
10:24:26 18 present it. And that does seem -- let's assume the
10:24:30 19 government says, Judge, we're not going to push this
10:24:32 20 issue. We will not, unless there's a trigger pulled by
10:24:40 21 Mr. Gilbert in his opening statement, we presently do
10:24:46 22 not anticipate offering the proffer or anything relating
10:24:50 23 to the proffer until such time as Zubair testifies. So
10:24:56 24 we can push the whole thing off. Concurrently, on the
10:25:00 25 2nd we will also have the redacted, certainly, which can

10:25:06 1 affect the Bruton issue, which is the basis, I believe,
10:25:12 2 Mr. Slade, for the severance motion.

10:25:18 3 MR. SLADE: It's one of them, Judge, you're
10:25:20 4 right.

10:25:20 5 THE COURT: And what else is there? Remind
10:25:24 6 me.

10:25:24 7 MR. SLADE: There are certain other
10:25:26 8 statements that we think are problematic that aren't
10:25:28 9 proffered statements by Zubair.

10:25:30 10 THE COURT: Are those the interview
10:25:32 11 statements, the three interview statements, or are there
10:25:36 12 others?

10:25:36 13 MR. SLADE: There's certain e-mails and
10:25:38 14 phone calls between Zubair and --

10:25:42 15 THE COURT: Sayed Ahmed?

10:25:44 16 MR. SLADE: Exactly, Judge.

10:25:46 17 THE COURT: Well, again. Let me do this.
10:25:50 18 I'm going to say government to provide proposed redacted
10:25:54 19 versions of Defendant Zubair Ahmed's proffer statement
10:26:00 20 and other statements by the --

10:26:16 21 MR. SOFER: Your Honor, may I interrupt? I
10:26:18 22 apologize. Those statements, that's a separate
10:26:22 23 legal -- a completely separate legal issue.

10:26:26 24 THE COURT: Those you're going to be
10:26:26 25 offering as coconspirator's statements?

10:26:30 1 MR. SOFER: Exactly, Your Honor.

10:26:30 2 THE COURT: All right. Then I'll deal with
10:26:32 3 that in due course. That's just -- I mean, those, I
10:26:36 4 can't rule on those until we get to trial anyway.

10:26:40 5 But so my question, Mr. Slade, is: The
10:26:42 6 principle basis or a cornerstone/keystone basis for
10:26:48 7 severance of Khaleel is the proffer?

10:26:52 8 MR. SLADE: That is a cornerstone. I also
10:26:56 9 believe, Judge, we've argued in our motion that the
10:26:58 10 government's intent to introduce those statements do
10:27:02 11 provide a basis for severance as an initial matter
10:27:04 12 because of the effect they would have on Khaleel.

10:27:08 13 THE COURT: Well, that's more of a 401/403
10:27:10 14 argument rather than the coconspirator argument; am I
10:27:14 15 correct?

10:27:14 16 MR. SLADE: They're not admissible under the
10:27:18 17 coconspirator exception under Khaleel.

10:27:20 18 THE COURT: Is that the government's
10:27:22 19 viewpoint?

10:27:24 20 MR. SLADE: The government disagrees.

10:27:26 21 MR. SOFER: We briefed this, Your Honor. We
10:27:28 22 believe they are admissible under the coconspirator
10:27:30 23 statement, ultimately much like the Amawi case or any
10:27:34 24 other large-scale conspiracy case, these statements are
10:27:40 25 admissible once a conspiracy has been established.

10:27:44 1 They are also potentially usable to establish, in part,
10:27:50 2 that a conspiracy exists. And so, I mean, I don't
10:27:56 3 know -- I know what the Court's practice was in the
10:27:58 4 Amawi case; the government went forward with its case.
10:28:02 5 There was -- there came a time somewhere in the
10:28:04 6 beginning of the trial where it was clear that a
10:28:08 7 conspiracy had been established. We think you can take
10:28:10 8 a look at the evidence that's been submitted already
10:28:14 9 just to the Court by the parties that it's clear that it
10:28:20 10 makes out already at least a prima facie case that
10:28:24 11 there's a conspiracy that involves these three men.
10:28:30 12 Again, there are courts which have long hearings prior
10:28:34 13 to trial to -- where the government has to establish the
10:28:36 14 existence of a conspiracy. But that's certainly not
10:28:40 15 what we did in the Amawi case. And that would take a
10:28:44 16 fairly long period of time for us to sort of go forward
10:28:46 17 with a big chunk of our case prior to trial in order to
10:28:50 18 show that these are, in fact, coconspirator statements.
10:28:54 19 But again, I think the Court already has enough
10:28:56 20 information before it to find that there's a credible
10:28:58 21 argument for that and that counsel's motion to sever the
10:29:02 22 case at this time is inappropriate.

10:29:04 23 MR. SLADE: Your Honor, we're going to file
10:29:06 24 our reply brief today on that.

10:29:08 25 THE COURT: That's fine. I'll look at it,

10:29:10 1 and we can talk about this further on the 9th. I don't
10:29:14 2 think we need a hearing on that right now. But we can
10:29:16 3 talk about it on the 9th. Okay?

10:29:20 4 MR. SLADE: I agree, Judge. Thank you.

10:29:26 5 THE COURT: Document 57, which is Zubair's
10:29:34 6 motion to suppress his oral statements -- hold on one
10:29:48 7 minute. And that also -- there's also, I assume, Terry
10:29:54 8 Gilbert, you have -- you think you have moved or would
10:29:58 9 move orally to suppress the e-mail from his desk during
10:30:02 10 one of the interviews?

10:30:02 11 MR. GILBERT: Yes, I think we did raise
10:30:04 12 that.

10:30:04 13 THE COURT: I think the government was a
10:30:06 14 little uncertain about that.

10:30:08 15 MR. GILBERT: If not, we will.

10:30:10 16 THE COURT: But I do think we need a hearing
10:30:12 17 for the reasons indicated. That's document number 57.

10:30:22 18 Now, with regard to documents 58 and 63, the
10:30:30 19 motion to suppress the searches.

10:30:38 20 MR. SLADE: Your Honor, as far as Khaleel's
10:30:40 21 motion, our reply brief is going to be filed today. I
10:30:42 22 think we are and the government are in agreement that
10:30:44 23 there's no evidence required. It's really on the face
10:30:50 24 of the affidavit.

10:30:52 25 THE COURT: Okay.

10:31:06 1 MR. SLADE: Zubair's motion, that's one I
10:31:08 2 believe we do need some evidence on, in particular the
10:31:12 3 part to suppress the evidence that was found in
10:31:16 4 Khaleel's -- the basement of Khaleel's house.

10:31:20 5 THE COURT: That's a standing issue?

10:31:22 6 MR. SLADE: No, it's not a standing issue.
10:31:24 7 The question is whether the government had authority to
10:31:30 8 go into the basement of Khaleel's house because that's
10:31:34 9 not part of the house that's occupied or controlled by
10:31:38 10 his family.

10:31:38 11 THE COURT: I thought the government was
10:31:40 12 contending Zubair had no standing.

10:31:42 13 MR. SLADE: No. Is that an argument the
10:31:46 14 government's raising?

10:31:48 15 MR. SOFER: Right. But I do think we, in
10:31:52 16 any event -- also, I gather, you're suggesting even --
10:31:58 17 assuming he has standing, then it's a question of
10:32:00 18 whether or not that was within the scope of the warrant?

10:32:02 19 MR. SLADE: That's correct, Judge.

10:32:04 20 THE COURT: And we do need a hearing on
10:32:06 21 that, right?

10:32:08 22 MR. SOFER: Here, Your Honor, I guess --
10:32:08 23 this is Greg Sofer -- I think the question is, I
10:32:14 24 believe, that Zubair argued that Khaleel's family told
10:32:22 25 the executing agents that a particular area of the home

10:32:28 1 was off limits, essentially that they did not have
10:32:32 2 access to it. I assume then that the first witnesses in
10:32:38 3 this hearing will be those called by the defense to
10:32:42 4 establish that, and the government will have an
10:32:44 5 opportunity to cross-examine them, then call whatever
10:32:46 6 witnesses we wish to rebut that argument. But absent
10:32:52 7 that factual issue there, I don't believe anyone's
10:32:54 8 arguing -- someone tell me if I'm wrong -- that there
10:32:58 9 was anything inappropriate about the search other than
10:33:00 10 that which has been briefed and does not require a
10:33:02 11 hearing.

10:33:04 12 MR. SLADE: This is Mike Slade. I think
10:33:06 13 Mr. Sofer is right. So Zubair --

10:33:12 14 MR. SOFER: So Zubair will call members --
10:33:14 15 somebody as a witness who was there at the execution of
10:33:18 16 the warrant who will testify: Hey, we told the agents,
10:33:20 17 you can't go in there. And that will -- and the
10:33:24 18 government should be able to cross-examine those
10:33:26 19 witnesses. And if we choose then would call the
10:33:28 20 witnesses who executed the search to say otherwise.

10:33:32 21 THE COURT: Okay. But anyway, we need a
10:33:34 22 hearing as to standing and the authority to enter the
10:33:38 23 basement?

10:33:40 24 MR. SOFER: I believe that's correct, Judge.

10:33:42 25 THE COURT: Okay. And we do not need a

10:33:46 1 hearing as to document 63, which is Khaleel's motion,
10:33:52 2 once the reply is filed today?

10:33:56 3 MR. SLADE: That's correct, Judge.

10:34:02 4 THE COURT: Just one more time, we do need a
10:34:04 5 hearing as to document 57, Zubair's motion to suppress
10:34:08 6 oral statements? That hearing, though, as far as the
10:34:12 7 9th would be concerned would be limited to the three
10:34:16 8 interviews; is that correct, Mr. Slade?

10:34:22 9 MR. GILBERT: It would be Mr. Gilbert.

10:34:24 10 THE COURT: I'm sorry.

10:34:24 11 MR. GILBERT: You're absolutely right.

10:34:26 12 THE COURT: Fine. I just want to know
10:34:28 13 that.

10:34:30 14 Zubair's motion to dismiss, you're going to
10:34:34 15 be filing a reply on that. Is that due today?

10:34:36 16 MR. GILBERT: I don't think we're going to
10:34:38 17 file a reply on that, Judge.

10:34:40 18 THE COURT: So it's decisional now. If I
10:34:46 19 want an argument, I'll let you know in advance of the
10:34:50 20 hearing. Okay?

10:34:50 21 MR. GILBERT: Okay.

10:34:52 22 THE COURT: The motion to change venue.

10:34:54 23 MR. SLADE: Your Honor, our reply will be
10:34:58 24 filed today. It's due today.

10:34:58 25 THE COURT: I have a question for you,

10:35:00 1 though. And let me preface it by saying I remain both
10:35:06 2 unenthusiastic and unpersuaded that a change of venue is
10:35:14 3 necessary, at least until we start the voir dire process
10:35:20 4 and find out whether or not we can find jurors, A, who
10:35:26 5 may have been unaware of the prior trial. And my past
10:35:30 6 experience in similar situations suggests to me, as
10:35:34 7 remarkable as it might seem, that there will be a fair
10:35:36 8 number of people in the venire who are unaware of it or
10:35:40 9 who have only a passing awareness, a shallow awareness.
10:35:46 10 That being said, I notice that your -- am I correct that
10:35:54 11 the exhibits are all from the -- are from print media;
10:36:00 12 namely, The Blade.

10:36:02 13 MR. SLADE: That's correct, Judge.

10:36:04 14 THE COURT: Well, let me suggest to you,
10:36:04 15 again, in the interest of perfecting the record, I was
10:36:08 16 told -- I don't watch television. Our TV only gets two
10:36:14 17 stations, and neither of them is Fox news, which I
10:36:18 18 wouldn't watch anyway, but somebody mentioned to me
10:36:20 19 during the course of the trial in Amawi that the Fox
10:36:26 20 News account, they would report on what was going on.

10:36:32 21 MR. SLADE: Yeah, we're aware of that,
10:36:36 22 Judge. There was a local -- in Toledo there was an
10:36:38 23 update on Fox News every night. Quite frankly, the
10:36:42 24 reason that we didn't put it in the initial papers is we
10:36:46 25 couldn't locate actual evidence of that that we could

10:36:50 1 print out and attach to the brief.

10:36:52 2 THE COURT: Well, I'm just trying to give
10:36:54 3 you the opportunity to perfect the record. I mean, I'm
10:36:58 4 being very candid with you, even despite that, I'm
10:37:02 5 disinclined to grant the motion for change in venue.
10:37:04 6 But I think it's important, I mean what is it, 85
10:37:08 7 percent of what people, quote, learn about the news they
10:37:12 8 get from broadcast media, principally TV. And I'm told
10:37:16 9 that Fox News -- I don't know who told me this; it was
10:37:20 10 some point during Amawi that they would have a picture
10:37:24 11 of the twin towers on fire then would say -- "Terror in
10:37:28 12 Toledo" would be the lead-in, and then they'd have some
10:37:30 13 snippet about what the case was about. And if you want
10:37:34 14 to subpoena Fox or do whatever you want to supplement
10:37:38 15 the record, I'm perfectly content to let you do it.

10:37:42 16 MR. SLADE: We appreciate that, Judge.
10:37:42 17 Thanks.

10:37:44 18 THE COURT: I'll give you leave, let's say
10:37:46 19 until -- to defendant -- defendants to supplement
10:37:56 20 motions to change venue by December 2. Okay.

10:38:04 21 MR. SLADE: That's great, Judge. Thank
10:38:10 22 you.

10:38:10 23 THE COURT: And otherwise, I don't think any
10:38:12 24 hearing is needed on that.

10:38:16 25 MR. SLADE: We agree, Judge.

10:38:26 1 THE COURT: Mr. Sofer, maybe we can talk
10:38:28 2 about if they supplement it, what do we do in terms of
10:38:34 3 response from the government on the 9th?

10:38:36 4 MR. SOFER: All I remember, Your Honor, is
10:38:38 5 reading articles that were not good for the government
10:38:42 6 until the end. That's my selective memory, perhaps.

10:38:52 7 THE COURT: I'm just making a note.

10:38:58 8 Who's speaking please?

10:38:58 9 MR. TERESINSKI: Jerry Teresinski, Your
10:39:00 10 Honor. How are you?

10:39:02 11 THE COURT: Fine.

10:39:02 12 MR. TERESINSKI: I'm not interrupting; I
10:39:04 13 just have to go; I have a doctor's appointment.

10:39:06 14 THE COURT: No problem.

10:39:32 15 (Discussion had off the record.)

10:39:32 16 THE COURT: Khaleel's motion to suppress, I
10:39:34 17 already talked about that. And government's motion.
10:39:42 18 This is the last one on my stack, 81, on the waiver of
10:39:46 19 the attorney/client privilege. And on I'm
10:39:52 20 punting/finessing that for now, okay, as indicated in
10:39:54 21 our earlier discussion.

10:39:58 22 MR. GILBERT: Your Honor, I think we were
10:40:00 23 supposed to talk about the jury questionnaire today.
10:40:02 24 And I have a proposal. I know the government has
10:40:04 25 received, and Mike can talk about this further, but I

10:40:08 1 think the government has received our proposed
10:40:12 2 questionnaire. Is that correct?

10:40:14 3 MR. GETZ: Yes. This is Tom Getz. We have
10:40:18 4 received those. And I'm going to begin reviewing those
10:40:22 5 today.

10:40:22 6 MR. GILBERT: Judge, I was going to ask,
10:40:24 7 though, since we have to be in Toledo the 9th and 10th
10:40:26 8 that we could talk about the questionnaire then, and we
10:40:30 9 would have our expert, Mr. Guastaferro, come in and be
10:40:34 10 available.

10:40:36 11 THE COURT: Okay. I think that makes
10:40:44 12 sense. Let me now -- Amy, what's going on? You told
10:40:50 13 me earlier this morning Annie is sending out what?

10:40:54 14 THE CLERK: She will need to send out the
10:40:58 15 prescreenings to jurors and give them about six weeks at
10:41:00 16 least, like she did in Amawi. She sent out 1,500
10:41:04 17 summons. She could get at least 500 jurors here.

10:41:06 18 THE COURT: Have you people seen the
10:41:08 19 prescreening questionnaire that goes out?

10:41:12 20 MR. SLADE: Yeah, I have not seen it.

10:41:14 21 THE COURT: Can you get that to counsel?
10:41:16 22 Counsel, if you'll -- how soon does Annie want to send
10:41:24 23 that stuff out?

10:41:24 24 THE CLERK: I think by the end of November.

10:41:56 25 THE COURT: Is that the one that was

10:41:58 1 homemade or standard?

10:42:00 2 THE CLERK: Standard. District standard
10:42:02 3 form.

10:42:12 4 THE COURT: I'm going to have you give me
10:42:14 5 comments, if any. Can she wait until the week of
10:42:16 6 December 2?

10:42:20 7 THE CLERK: I would think so.

10:42:24 8 THE COURT: Clerk to provide counsel with
10:42:26 9 prescreening juror questionnaire forthwith. Counsel to
10:42:32 10 provide comments, if any, by December 2.

10:42:34 11 Counsel, what I want you to do is if you can
10:42:36 12 agree on a, quote, homemade or specific questionnaire,
10:42:40 13 that's fine. Okay. It should be very -- it shouldn't
10:42:44 14 be very long. How long is the one that we use now?

10:42:48 15 THE CLERK: Actually, Judge, I think what
10:42:50 16 goes out to them is where they can just return it saying
10:42:52 17 that they're exempt or they have a medical excuse. I
10:42:56 18 think that that's -- I think it's just a one-page
10:43:00 19 governmental perforated form that they pull apart and
10:43:04 20 send back.

10:43:06 21 THE COURT: I'm going to leave this alone.
10:43:08 22 We used it before in Amawi, and it worked. You can
10:43:10 23 send it to them if you want, Amy, but, I mean, if
10:43:14 24 there's some real yelling and screaming that's to be
10:43:16 25 done, let Amy and everybody else know as soon as

10:43:20 1 possible so we can talk about it if necessary towards
10:43:24 2 the end of this week or next week. All right.

10:43:30 3 MR. SLADE: That would be great. Amy, if
10:43:32 4 you can get that to us -- actually, our jury consultant
10:43:36 5 is going to be here this afternoon. I doubt there's
10:43:38 6 going to be yelling and screaming.

10:43:40 7 THE COURT: I think it's a standard form. I
10:43:42 8 think we use it -- it's just the ordinary government
10:43:46 9 issued form, whatever it says and does. Okay.
10:43:54 10 Anything else we have to talk about?

10:43:58 11 MR. SOFER: Not that I'm aware of, Your
10:44:00 12 Honor. This is Greg Sofer.

10:44:00 13 THE COURT: So why don't you tell me, let me
10:44:02 14 make sure I know what work I've got -- is ready to be
10:44:08 15 done. Khaleel's motion to suppress will be decisional
10:44:14 16 with the filing of the reply, correct?

10:44:16 17 MR. SLADE: That's correct.

10:44:24 18 THE COURT: Okay. Zubair's motion to
10:44:30 19 dismiss is decisional.

10:44:42 20 The motion to take testimony overseas is
10:44:46 21 decisional; that's document 72, it looks like.

10:44:56 22 The hearing on the 9th will include Zubair's
10:45:02 23 challenge to the interview, the three interviews.

10:45:08 24 The challenge to the proffer I'm going to
10:45:10 25 hold in abeyance doing anything on for further filing by

10:45:16 1 the government and discussion on the 9th.

10:45:22 2 The FISA motion will be decisional on the
10:45:26 3 15th of December. That's document 56.

10:45:34 4 The motion for severance I'm basically
10:45:36 5 holding in abeyance pending further discussion on the
10:45:42 6 9th after the government responds to today's order.
10:45:58 7 Okay. Hold on one second.

10:46:08 8 Zubair's motion to suppress will be heard on
10:46:18 9 the 9th as to standing and authority/scope or whatever
10:46:24 10 of the search. Right?

10:46:28 11 MR. SOFER: Yes, Judge.

10:46:30 12 THE COURT: Okay. Khaleel's motion to
10:46:32 13 change venue will be supplemented, if you want to
10:46:36 14 supplement it, by the 2nd.

10:46:38 15 And we will discuss whether we need further
10:46:42 16 briefing, et cetera, on the 9th. Okay.

10:46:52 17 MR. SLADE: Yes, Your Honor.

10:46:52 18 MR. GILBERT: Judge, what would be the order
10:46:54 19 of the hearings on the 9th and 10th.

10:46:58 20 THE COURT: I assume -- it looks to me like
10:47:00 21 we can get everything done on the 9th. As far as I can
10:47:04 22 tell, we've got the two hearings. It's basically you
10:47:06 23 that are going to be having the hearings. And why
10:47:10 24 don't you -- I think you have to -- you've got the
10:47:12 25 burden of going forward. So why don't you let the

10:47:18 1 government and everybody else know whom you're going to
10:47:22 2 be calling and when you plan to call them.

10:47:24 3 MR. GILBERT: Okay.

10:47:26 4 MR. SOFER: One thing that would smooth
10:47:28 5 things along for us would be any witnesses called by the
10:47:30 6 defense, if we could at least get their dates of birth
10:47:34 7 and place of birth as far in advance of the hearing as
10:47:38 8 possible, it would be much appreciated.

10:47:40 9 THE COURT: Okay.

10:47:42 10 MR. SOFER: Obviously if either of the
10:47:44 11 defendants testify, we may have dates of birth. We may
10:47:48 12 have dates of birth of other people. But at least if
10:47:50 13 you could give us a list of witnesses testifying.

10:47:54 14 MR. GILBERT: Would you give us a list of
10:47:56 15 dates of birth of your witnesses?

10:47:58 16 MR. SOFER: I don't think so.

10:48:00 17 MR. KERGER: Why should we give you --

10:48:02 18 THE COURT: So they can run a record check,
10:48:04 19 right, Greg Sofer?

10:48:04 20 MR. SOFER: That's exactly right, Judge.

10:48:08 21 THE COURT: That's all. Okay. Anything
10:48:10 22 else we have to talk about?

10:48:12 23 MR. GETZ: Tom Getz. Just quickly, since
10:48:14 24 I've been in trial, I want to confirm with counsel that
10:48:16 25 they received copies of our translations and

10:48:20 1 transcriptions, our draft, and get some idea of if we
10:48:24 2 will be getting back any proposed changes or --

10:48:30 3 MR. SLADE: Actually, Mr. Getz, I'm glad you
10:48:32 4 brought that up. Our translators are working through
10:48:34 5 it. I may -- and there's likely to be some issues, not
10:48:38 6 a ton. But I may need more time. Our deadline right
10:48:42 7 now is the end of this month. I'm hoping to get it to
10:48:46 8 you then. But I'll be in touch with you in the near
10:48:50 9 future about the plans.

10:48:50 10 MR. GETZ: You're not seeing any major
10:48:52 11 problems or issues at this point?

10:48:54 12 MR. SLADE: Nothing major. But I think
10:48:56 13 we're going to have some issues to talk through.

10:49:00 14 THE COURT: Well, you guys can talk with
10:49:00 15 each other. Okay.

10:49:02 16 MR. SLADE: Our hope is to work everything
10:49:04 17 out with the government well in advance of the trial
10:49:08 18 about the translation and on the translation and
10:49:10 19 transcription front.

10:49:12 20 THE COURT: To the extent you're a little
10:49:16 21 late in getting that stuff to them, you don't need a
10:49:18 22 further order or whatever -- well, I'll tell you what
10:49:20 23 I'll do. Leave granted to defendants to provide -- to
10:49:42 24 respond to government's proposed translations and
10:49:52 25 transcripts by December 15. Okay?

10:49:58 1 MR. SLADE: Appreciate that, Judge. Thank
10:50:00 2 you.

10:50:00 3 THE COURT: No problem. In light of what
10:50:00 4 you're saying, it sounds like that's not going to cause
10:50:04 5 a problem. If it does, it does. Such is life.
10:50:06 6 Okay. Anything else?

10:50:10 7 MR. SOFER: To the extent the government
10:50:12 8 would want to see you ex parte pursuant to CIPA, can you
10:50:14 9 just give us an idea what your schedule is like over the
10:50:18 10 next several weeks?

10:50:20 11 THE COURT: Yes. This Friday I'm leaving
10:50:24 12 for Thanksgiving week, will be back in the office
10:50:30 13 Monday, December 1. And I will be in the office and
10:50:34 14 available until probably about the 19th or 20th of
10:50:38 15 December. And then I will be out of the office until
10:50:42 16 January 12.

10:50:46 17 MR. SOFER: Very well.

10:50:48 18 THE COURT: If for some reason I will be --
10:50:50 19 during both of those periods I will be either outside of
10:50:54 20 New York City -- actually, the week before Christmas and
10:50:58 21 through Christmas I'll be in Louisville, and the week
10:51:04 22 after Christmas and the first week of the New Year's I
10:51:06 23 will be either in Boston or New York.

10:51:12 24 MR. SOFER: We were hoping for Hawaii, Your
10:51:14 25 Honor.

10:51:14 1 THE COURT: Sorry about that. My kids
10:51:18 2 moved far away, but they all stayed north.

10:51:22 3 MR. SOFER: Very well.

10:51:22 4 THE COURT: I can't imagine you would need
10:51:24 5 to see me, but if you did, my office can get a hold of
10:51:26 6 me, and you're more than welcome to do so if it's that
10:51:30 7 important or crucial.

10:51:30 8 MR. SOFER: I'm confident we will not bother
10:51:34 9 you on your vacation, Judge.

10:51:36 10 THE COURT: And then starting on January 12
10:51:38 11 when I'm back in the office, I plan -- I'm here for the
10:51:44 12 duration.

10:51:50 13 MR. SOFER: For the trial, Your Honor, will
10:51:52 14 it also be Mondays off again?

10:51:54 15 THE COURT: Right. Two things about the
10:51:56 16 trial. One is that I would expect the same
10:52:04 17 four-day-a-week sessions that we had with Amawi. As
10:52:12 18 Tom Getz can relate what was for him an unhappy
10:52:16 19 experience in this El-Hindi trial last week, all
10:52:22 20 exhibits I will withhold ruling on admissibility of
10:52:26 21 exhibits, unless specifically I have to rule on
10:52:30 22 admissibility due to some evidentiary objection, until
10:52:34 23 completion of each party's case. In other words, it's
10:52:38 24 neither necessary nor do I want you to move an exhibit's
10:52:42 25 admission unless there's been an objection and a ruling.

10:52:46 1 That requires the decision as to whether to admit or to
10:52:50 2 exclude, but that way people can go through everything
10:52:56 3 with Amy before you formally rest, make sure
10:53:00 4 everything's been admitted.

10:53:00 5 The other thing is in the El-Hindi case, for
10:53:06 6 various reasons, instead of trying the case in the space
10:53:10 7 of two or three days, it took about -- it took more than
10:53:16 8 a week because the government kept running out of
10:53:18 9 witnesses. I know we did that a bit with Amawi. And
10:53:20 10 I want to make real clear I don't want that to happen in
10:53:26 11 this case. I don't want to be adjourning at 3:00
10:53:32 12 because we're out of witnesses, or 2:00, or whatever.
10:53:36 13 So as you schedule your witnesses, I will expect you to
10:53:40 14 have witnesses available up until 4:30 or 5:00 every
10:53:46 15 day. If it means inconvenience for witnesses, that's
10:53:50 16 too bad, because it's really a major inconvenience for
10:53:52 17 me in terms of my own ability to adjust and work my own
10:53:56 18 schedule not to have a full trial day. Okay.

10:54:04 19 MR. GILBERT: Okay.

10:54:06 20 THE COURT: Anything else from the
10:54:06 21 government?

10:54:08 22 MR. SOFER: Not me, Your Honor. Greg
10:54:12 23 Sofer.

10:54:12 24 MR. GETZ: Nor from Tom Getz.

10:54:12 25 THE COURT: Express our collective

10:54:14 1 congratulations to Mr. Herdman and his new family.

10:54:18 2 We all hope it goes well for your wife and
10:54:20 3 your family, Greg Sofer.

10:54:22 4 And in the meantime, everybody have a
10:54:24 5 pleasant Thanksgiving.

10:54:26 6 MR. GILBERT: Thank you, Judge.

10:54:28 7 MR. SOFER: Thank you, Judge.

10:54:28 8 THE COURT: I'll see you all well nourished
10:54:30 9 and refreshed on the 9th of December. If you want a
10:54:34 10 transcript, ask for Tracy. Thanks.

11 - - -

12 C E R T I F I C A T E

13

14 I certify that the foregoing is a correct transcript
15 from the record of proceedings in the above-entitled
16 matter.

17

18 /s Tracy L. Spore_____

19 Tracy L. Spore, RMR, CRR

_____ Date

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